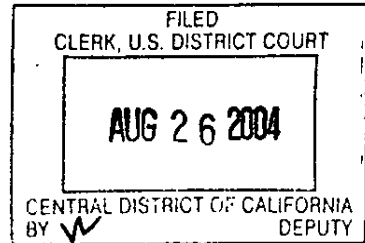


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA
DEPARTMENT OF TOXIC
SUBSTANCES CONTROL,

Plaintiff,

v.

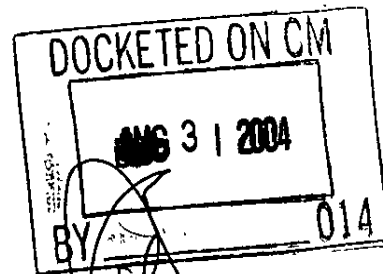
ALCO PACIFIC, Inc., et al.,

Defendants,

AND RELATED COUNTERCLAIMS.

NO. CV 01-9294 SJO (FMOx)

ORDER GRANTING PLAINTIFF'S MOTION
FOR APPROVAL OF CONSENT DECREES



The court has before it Plaintiff State of California Department of Toxic Substances Control's (*hereinafter* "DTSC") Motion for Approval of Consent Decrees. The Motion is opposed by the sole remaining non-settling Defendant, J.L. Shepherd & Associates ("J.L. Shepherd"). The instant matter is set for trial on August 31, 2004. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the court finds this matter is appropriate for decision without oral argument. Having thoroughly considered the arguments and points of law submitted by counsel, Plaintiff's Motion for Approval of Consent Decrees is hereby GRANTED.

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1 I. BACKGROUND

2 A. Procedural History

3 As the court explained in greater detail in a series of Opinions and Orders addressing
4 earlier filed motions, this is a cost recovery action brought by the State of California, Department
5 of Toxic Substances Control, pursuant to the Comprehensive Environmental Response,
6 Compensation and Liability Act ("CERCLA"). The state seeks reimbursement of costs incurred
7 cleaning the site of a former lead processing facility in Carson, California, as well as a declaration
8 that it is entitled to recoup future costs. The facility in Carson occupied a one-acre parcel of land
9 and it is known as the Alco Pacific Site (the "Site" or "Alco Pacific Site"). Defendants Alco Pacific,
10 Inc. and Morris P. Kirk (*collectively* "Alco Pacific") owned and operated the Site from
11 approximately 1950 to 1990. *Cal. Dep't of Toxic Substances Control v. Alco Pacific, Inc.*, 317 F.
12 Supp. 2d 1188, 1189 (C.D. Cal. 2004).

13 Certain named Defendants sent material to the Alco Pacific Site while the Site was in
14 operation. *Id.* The material included lead ingots, cuttings, dross and slag. Plaintiff alleges
15 material sent to the Site by Defendants contributed to contamination at the Site. *Id.* Defendants
16 filed a motion for summary judgment raising two issues: (1) whether the material sent by
17 Defendants to the Site fall under the useful product exemption; and (2) whether the materials
18 otherwise fall under the exemption for recycling of scrap metal ("Recycling Exemption" or "Section
19 127"). *Id.* Co-Defendant J.L. Shepherd joined in the motion. The motion did not address
20 J.L. Shepherd's alleged liability for Cesium-137 contamination on the Site. *See id.* The matter
21 came before the court for hearing on January 16, 2004. The court granted the motion, resolving
22 all claims against the moving parties except for any claims against J.L. Shepherd related to
23 Cesium-137 contamination. (Order of February 06, 2004.) Defendants subsequently moved for
24 summary judgment regarding the statute of limitations. *Cal. Dep't of Toxic Substances Control*
25 *v. Alco Pacific, Inc.*, 308 F. Supp. 2d 1124 (C.D. Cal. 2004)(*hereinafter "Alco Pacific I"*). That
26 motion was denied on March 03, 2004. *Alco Pacific I, supra*, 308 F. Supp. 2d at 1137.

27 Plaintiff DTSC then filed a motion for summary judgment on the Scope of Agency Review.
28 That motion was filed in order to foreclose Defendants' argument that Plaintiff's response to

contamination on the Site was "inconsistent with the national contingency plan." *Cal. Dep't of Toxic Substances Control v. Alco Pacific, Inc.*, 317 F. Supp. 2d 1188, 1191 (C.D. Cal. 2004) (hereinafter "*Alco Pacific II*") According to Plaintiff, each Defendant "alleges this affirmative defense because DTSC may recover, from any responsible party under CERCLA, only those 'costs of removal or remedial action . . . not inconsistent with the national contingency plan.'" *Id.* Plaintiff explained the national contingency plan ("NCP") "is a federal regulation that identifies the types of response actions (in CERCLA terms, "removal" or "remedial" actions) that the United States, a state, an Indian tribe, or a private party may undertake in response to releases or threats of releases of hazardous substances." *Id.* Plaintiff DTSC suggested the Defendants plan to accuse it of departing from the NCP in order to limit the extent of Plaintiff's recovery. *Id.* The court held "pursuant to the language in section 9613(j)(1), this court will not look past the administrative record in determining whether Plaintiff DTSC deviated from the NCP in responding to contamination at the Site." *Alco Pacific II*, 317 F. Supp. 2d at 1194.

More recently, J.L. Shepherd moved for "resubmission and reconsideration" of the Opinions and Orders of February 06, 2004 and March 03, 2004. The Order of February 06, 2004 granted summary judgment on the issue of recycling exemption; and the Order of March 03, 2004 denied summary judgment on the question of whether the statute of limitations had expired. (See Order of August 02, 2004.) In its motion for reconsideration, Defendant J.L. Shepherd argued: (1) the statute of limitations had run with respect to Cesium-137 contamination; (2) "new facts" were discovered warranting summary judgment as to the Cesium-137 contamination; and (3) any damage award against J.L. Shepherd should be reduced, taking into account the proportionate harm done by Cesium-137 contamination. (*Id.*) The motion was denied in all respects. The court reaffirmed its holding in *Alco Pacific*, 308 F. Supp. 2d at 1137, finding there was one single removal action with respect to all contamination. (*Id.* at 10.) The court also found it would be inappropriate to apportion or allocate damages until liability is finally determined as to all parties. (See *id.* at 8.)

Turning to the matter now before the court, Plaintiff is moving for approval of two Consent Decrees - one for each of the settling Defendants. The instant Motion would resolve liability and

1 damages against two of three remaining Defendants. The settling Defendants are: (1) Alco
 2 Pacific and Morris P. Kirk (*collectively* "Alco Pacific"); and (2) Lead Products Company, Inc. ("Lead
 3 Products"). Defendant J.L. Shepherd opposes the Motion on two grounds: (1) first, Defendant
 4 argues the Motion should be denied because the exact present values of the settlements are
 5 unclear; and (2) J.L. Shepherd also argues it is entitled to credit or set-off from settling
 6 Defendants. (Opp'n at 2 & 4.)

7 B. Settlement and Consent Decree Pertaining to Defendant Alco Pacific

8 The consent decree notes Plaintiff "reviewed the financial information submitted by Alco
 9 Pacific to determine whether Alco Pacific is financially able to pay response costs incurred and
 10 to be incurred at [the Site]." (P.&A., Ex. A., Alco Pacific Consent Decree at 3:10-13.) The
 11 Consent Decree describes the following features of the settlement between Plaintiff and Alco
 12 Pacific: (1) Defendant Alco Pacific is to pay three hundred thousand dollars; and (2) "all funds
 13 remaining in the McKenna Long & Aldridge LLP retainer account for Alco Pacific as of the
 14 Effective date of [the] Consent decree." (*Id.* at 4:8-10.) The settlement provides a lien in favor
 15 of Plaintiff to "arise and attach on the Subject Property . . . for any and all past and future
 16 response costs incurred, or to be incurred, by the Department regarding the subject property."
 17 (*Id.* at 4:22-25.) Moreover, the settlement provides that Alco Pacific shall, within 30 days from the
 18 effective date of the instant Consent Decree, "make good faith efforts to sell, transfer, or otherwise
 19 assign any interest in the Subject Property . . . at Fair Market Value." (*Id.* at 6:4-16.) The
 20 settlement and Consent Decree require all proceeds from the sale to be transferred to Plaintiff:
 21 "Alco Pacific shall pay to the Department all proceeds from any sale, transfer, hypothecation, or
 22 assignment of any interest in the Subject Property, less closing costs of sale reasonably incurred
 23 and actually paid by Alco Pacific, including reasonable attorneys fees, and less and proceeds paid
 24 to the State of California or County of Los Angeles for outstanding property taxes, penalties, and
 25 interest thereon." (*Id.* at 7:2-7.) In return, Plaintiff covenants "not to sue or take any further civil
 26 or administrative action . . . against: [Alco Pacific]." (*Id.* at 7:19-23.) There are, however,
 27 extensive "carve-outs" or exceptions to Plaintiff's covenant not to sue. (*Id.* at 9-10.) Plaintiff, for
 28 example, reserves its right to sue if new facts come to light regarding criminal liability or the

existence of "conditions previously unknown to the Department . . . at the Subject Property . . . indicat[ing] that (1) a hazardous substance has been or is being released . . . and (2) the response performed at the Subject Property is not protective of human health and the environment." (*Id.* at 9 & 10.) Finally, the parties stipulate that approval of the instant Consent Decree by this court shall constitute final judgment with respect to the settling parties pursuant to Fed. R. Civ. P. 54(b).

C. Settlement and Consent Decree Pertaining to Defendant Lead Products

The salient portions of Plaintiff's settlement with Defendant Lead Products are as follows: (1) Lead Products agrees to pay Plaintiff \$150,000 in three equal installments. (P.&A., Ex. B, Lead Products Consent Decree at 4.) The Consent Decree includes a similar covenant not to sue; with similar exceptions. (*Id.* at 5.) There is no provision that the settlement between Lead Products and Plaintiff constitutes final judgment pursuant to Fed. R. Civ. P. 54(b). (*See id.* at 10.)

II. LEGAL STANDARD

Plaintiff requests the court approve the Consent Decrees pursuant to 42 U.S.C. § 9612(f), which provides:

Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.
42 U.S.C. 9612(f).

Approval of a proposed consent decree is committed to the discretion of the district court. *United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027, 1035 (D. Mass. 1989) (*citing United States v. Hooker Chemical & Plastics Corp.*, 776 F.2d 410, 411 (2d Cir. 1985)). This discretion is to be exercised in light of the strong policy in favor of voluntary settlement of litigation. *Id.*; *see also B.F. Goodrich v. Betkoski*, 99 F.3d 505, 527 (2d Cir. 1996) (*commenting that the policy favoring settlements is even more pronounced in the CERCLA context.*) The presumption in favor of settlement is particularly strong where a consent decree has been negotiated by a government agency specially equipped, trained or oriented in the field. *See id.* (*citing United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1144 (C.D. Cal. 1978).

1 A district court should consider whether the decree is "reasonable, fair and consistent with
 2 the purposes CERCLA is intended to serve." *U.S. v. Cannons Engineering Corp.*, 899 F.2d 79,
 3 85 (1st Cir. 1990). The First Circuit states in *Cannons*, 899 F.2d 79 that "fairness in the CERCLA
 4 settlement context has both procedural and substantive components." *Id.* at 86. Other factors
 5 for the court to consider include reasonableness of the settlement and fidelity to the statute. *Id.*
 6 at 85-93. Accordingly, the four primary factors for this court to consider in the instant matter are
 7 (1) the procedural and (2) substantive fairness of the settlement; as well as (3) the
 8 reasonableness of the settlement, and (4) the goal of the statute. See *id.*

9 In determining whether a decree is "fair," courts have considered the following: "the
 10 strength of plaintiff's case, the good faith efforts of the negotiators, the opinions of counsel, and
 11 the possible risks involved in the litigation if the settlement is not approved." *United States v. Akzo*
 12 *Coatings of Am.*, 949 F.2d 1409, 1435 (6th Cir. 1991) (citing *Hooker Chemical & Plastics Co.*, 607
 13 F. Supp. at 1057.) "Fairness should be evaluated from the standpoint of signatories and
 14 nonparties to the decree." *Id.* (citing *Conservation Chemical Co.*, 628 F. Supp. 391, 401 (W.D.
 15 Mo. 1986)). "The effect on non-settlers should be considered, but is not determinative in the
 16 court's evaluation." *Id.* (quoting *Cannons Engineering Corp.*, *supra*, 720 F. Supp. at 1040.) "In
 17 determining whether a consent decree is 'reasonable' courts have considered the following: the
 18 nature/extent of hazards; the degree to which the remedy will adequately address the hazards;
 19 possible alternatives for remedying hazards; and the extent to which the decree furthers the goals
 20 of the statute." *Akzo Coatings of Am.*, 949 F.2d at 1436 (citing *Cannons Engineering Corp.*, 720
 21 F. Supp. at 1038.

22 III. DISCUSSION

23 A. Procedural Fairness

24 "To measure procedural fairness, a court should ordinarily look to the negotiation process
 25 and attempt to gauge its candor, openness, and bargaining balance." *Cannons Engineering*
 26 *Corp.*, *supra*, 899 F.2d at 86. In the instant case, settlement negotiations were conducted under
 27 the supervision of Magistrate Judge Fernando M. Olguin. (P.&A. at 7-8.) Supervision by a
 28 magistrate judge or special master is presumptively fair. See *Pneumo Abex Corp. v. Bessemer*

1 & *Lake Erie RR. Co.*, 936 F. Supp. 1274, 1279 (E.D. Va. 1996); see also *Kelley v. Thomas*
 2 *Solvent Co.*, 790 F. Supp. 731, 735 (W.D. Mich. 1991). As already noted by this court, there is
 3 a particularly strong presumption in favor of settlement where a consent decree has been
 4 negotiated by a government agency specially equipped, trained or oriented in the field. *Cannons*
 5 *Engineering Corp.*, 720 F. Supp. at 1035; see also *U.S. v. Montrose Chemical Corp.*, 50 F.3d 741,
 6 746 (9th Cir. 1995). Plaintiff, the California Department of Toxic Substances Control, and the
 7 California Attorney General are well equipped, trained and experienced in the field. Non-settling
 8 Defendant J.L. Shepherd was apprised of both settlements and has filed its objections with the
 9 court. In view of all these facts, the court finds the Consent Decrees were negotiated and agreed
 10 upon through a process that was procedurally fair.

11 B. Substantive Fairness

12 According to the First Circuit in *Cannons*, "[s]ubstantive fairness introduces into the
 13 equation concepts of corrective justice and accountability: a party should bear the cost of the
 14 harm for which it is legally responsible." *Cannons*, 899 F.2d at 87. "Fairness should be evaluated
 15 from the standpoint of signatories and nonparties to the decree." *Akzo Coatings of Am.*, 949 F.2d
 16 at 1435 (citing *Conservation Chemical Co.*, 628 F. Supp. 391, 401 (W.D. Mo. 1986)). "The effect
 17 on non-settlers should be considered, but is not determinative in the court's evaluation." *Id.* In
 18 *Cannons*, the First Circuit stated the government agency's "scheme . . . for measuring
 19 comparative fault and allocating liability should be upheld so long as the agency supplies a
 20 plausible explanation for it, welding some reasonable linkage between the factors it includes in
 21 its formula or scheme and the proportionate shares of the settling [parties]." *Cannons*, 899 F.2d
 22 at 87. In other words, "the chosen measure of comparative fault should be upheld unless it is
 23 arbitrary, capricious, and devoid of a rational basis." *Id.* Of course, it should be no surprise that
 24 "nonsettlers [are] at risk of bearing a disproportionate amount of liability . . . [which] can prove to
 25 be a substantial benefit to settling [parties] - and a corresponding detriment to their more
 26 recalcitrant counterparts." *New York v. Panex*, 2000 U.S. Dist. Lexis 7913 at 9 (W.D. N.Y. 2000)
 27 (quoting *Cannons*, 899 F.2d at 91.) An objecting party, "moreover, carr[ies] a heavy burden in
 28

1 opposing judicial approval of the settlements, inasmuch as the State's negotiated consent decrees
2 are presumptively valid." *Id.* at 4.

3 In the instant case, Plaintiff does not explicitly attribute a proportionate amount of fault
4 among Defendants. (See P.&A. at 10.) The objecting Defendant J.L. Shepherd also does not
5 attempt to calculate any proportionate fault, arguing instead that it is entitled to credit or "set-off"
6 from the settling Defendants. (See *generally*, Opp'n) The settlement is affected by the ability of
7 each settling Defendant to pay. (See, e.g., P.&A. Ex. A, Alco Pacific Consent Decree at ¶ 4.3.)
8 Plaintiff justifies the settlement on the relative strength of evidence that each Defendant sent
9 hazardous substances to the Site; and the strength of defenses raised by each Defendant. (P.&A.
10 at 10:6-9.) There is no basis for this court to conclude the apportionment of fault is unreasonable
11 or arbitrary. See *Cannons*, 899 F.2d at 87. Accordingly, this court has no choice but to find the
12 settlements are substantively fair. See *id.*

13 C. Reasonableness

14 In *Cannons*, the court found three factors relevant for evaluating the reasonableness of a
15 consent decree: (1) whether the settlement was likely to be effective in ensuring cleanup of the
16 property; (2) whether the public will be adequately compensated by the settlement; and (3) the
17 relative strengths of the parties. *Cannons*, 899 F.2d at 89-90. In the instant case, the settlements
18 provide partial funding in the amount of \$450,000 for the cleanup of the Site to be completed by
19 DTSC. As a result, (1) the settlements promote effective cleanup of the site. (2) The public is
20 clearly benefitted by the settlement. Although Plaintiff covenants not to sue, there are exceptions
21 to that covenant contained in the Consent Decree that allow Plaintiff to bring new claims against
22 settling Defendants in the event new facts or contamination come to light. Finally, (3) the
23 settlements appear wise considering the respective strength of the parties, the financial condition
24 of settling Defendants, the past history of cooperation among the parties, and the long history of
25 litigation in the instant case.

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1 D. Faithfulness to CERCLA

2 CERCLA's goals are (1) to create a prompt and effective response to hazardous waste
3 problems; and (2) to ensure those responsible for the contamination bear the costs and
4 responsibility for remedial action. *Cannons*, 899 F.2d at 90-91. These concerns appear to be
5 addressed in the instant case because (1) the contributions by settling Defendants to the public
6 treasury will help ensure effective response to present and future problems at the Site and any
7 other environmental contamination that may arise elsewhere in the state; and (2) it appears the
8 settlement is fair and practicable given the financial condition of each Defendant, and the relative
9 responsibility of each Defendant for the contamination.

10 E. Objection of J.L. Shepherd

11 Defendant J.L. Shepherd argues the Consent Decrees should not be approved on the
12 grounds that the amount of the settlement is indefinite due to the uncertainty surrounding the
13 value of the Site, and the amount Plaintiff may eventually obtain from the prospective sale of the
14 Site property. (See Opp'n at 2.) Defendant J.L. Shepherd also contends it is entitled to equitable
15 set-off from Defendants. (*Id.* at 3.) The court, however, finds it would be better to wait until there
16 is a final determination as to Defendant J.L. Shepherd's liability in the instant matter. See *U.S.*
17 *v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987). Before apportioning fault, it would be
18 prudent to first determine whether J.L. Shepherd is actually liable for contamination at the Site at
19 all; and if so, determine the basis for J.L. Shepherd's liability before apportioning fault among all
20 Defendants. See *id.*

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1 IV. RULING

2 The court hereby approves the Consent Decrees pertaining to the following Defendants:

3 (1) Alco Pacific and Morris P. Kirk; and (2) Lead Products Co., Inc. (See P.&A. Exs. A & B.)

4 Approval and entry of each Consent Decree constitutes final judgment with respect to Defendants

5 Alco Pacific, Morris P. Kirk and Lead Products Co., Inc. pursuant to Fed. R. Civ. P. Rule 54(b).¹

6 IT IS SO ORDERED.

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8 Dated this 27 day of August, 2004.

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11 S. JAMES OTERO
12 UNITED STATES DISTRICT JUDGE
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25 ¹ The Ninth Circuit has held a "trial court should not direct entry of judgment under Rule 54(b)
26 unless it has made specific findings setting forth the reasons for its order." *Morrison-Knudsen Co.*
27 *v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). In the instant case, final judgment is entered in order
28 to give finality to the settlement. The court finds it unlikely that entry of final judgment will lead to
piecemeal litigation of the instant case in the appellate courts. There being no cause for delay,
the court finds it in the best interests of the court, as well as the parties, to render final judgment
as to the settling Defendants.